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No. 04-151

Supreme Court, U.S.
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In The

Supreme Court of the United States

PUBLIC EMPLOYEES RETIREMENT BOARD OF THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF NEW MEXICO,

Petitioner,

v.

JAMES GILL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a private individual may pursue *Ex Parte Young* relief against state officials for violation of the Age Discrimination in Employment Act despite the fact that the Act contains a comprehensive remedial scheme?

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STATEMENT OF THE CASE

In 1974, Respondent, James Gill, joined the Hondo Volunteer Fire Department as a charter member, when he was 49. In over 22 years of service, Gill served variously as Engineer, Fireman and Chief of the Department.

In 1983, the New Mexico legislature enacted the Volunteer Firefighters Retirement Act, N.M. Stat. Ann., § 10-11A-1 *et seq.*. This Act set up a fund to pay retirement benefits to volunteer firefighters. As originally enacted, the Volunteer Firefighters Retirement Act arbitrarily cut off benefits to any firefighter who began to accumulate service credits after the age of 45. *See* Laws Of New Mexico 1983, ch. 263, § 2. The statute was amended in 2003 to remove this provision, but Respondent did not get the benefit of this amendment. *See* N.M. Stat. Ann., § 10-11A-2(E) (2003); *but cf.* Petition for Writ of Certiorari, App. at 3 (applying 2003 amendment prospectively only).

In 1990, the Volunteer Firefighters Retirement Act came into clear conflict with federal law, when Congress enacted certain amendments to the Age Discrimination in Employment Act (*hereinafter* "ADEA"). The ADEA allows employers to treat older workers differently with respect to fringe benefits, such as retirement plans, which cost more for older workers. *See* 29 U.S.C. § 623(f)(2)(B). After the 1990 amendments, however, the employer must prove that any difference in benefits is justified by cost, *i.e.* that the "actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker". *Id.* The New Mexico statute did not satisfy this test, because it arbitrarily cut off

benefits to workers over 45, rather than adjusting benefits to reflect costs incurred.

In 1997, Respondent James Gill applied to Petitioner for his retirement benefits. Petitioner denied the benefits, stating that Gill did not qualify for benefits because he was over 45 when he first could have started accumulating service credits. *See* Petition for Writ of Certiorari, App. at 3.

Respondent filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") and the equivalent New Mexico agency, and received a "Right to Sue" Notice from the EEOC on February 28, 2000. *Id.* Respondent then timely filed a lawsuit under the ADEA in the New Mexico state district court against Petitioner seeking damages, and declaratory and injunctive relief. *Id.*, App. 3-4. The State district court dismissed the lawsuit on the ground of "subject matter jurisdiction" (*i.e.* sovereign immunity). App. 32. Respondent appealed. The intermediate state appellate court affirmed the district court, App. 34 *et seq.*, but the highest court of the State of New Mexico reversed, App. 1 *et seq.*

The New Mexico Supreme Court held that, under the doctrine of *Ex parte Young*, Respondent could seek declaratory and prospective injunctive relief to direct Petitioner to pay Respondent retirement benefits. Petitioner now petitions this court for review, contending that the ADEA bars Respondent's "*Ex parte Young*" claim.

ARGUMENT

Declaratory and injunctive relief to conform State conduct to federal law, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908) is not permitted when it would be inconsistent with the federal statutory remedy. *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996); *see also Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 647 (2002). In this case, the New Mexico Supreme Court held that declaratory and prospective injunctive relief would be consistent with the ADEA. The state high court noted that Mr. Gill had exhausted his administrative remedy under the ADEA:

> Gill complied with these remedial procedures by first filing with the EEOC, and filing suit after receiving a "Right to Sue" notice from the EEOC. Thus, any injunctive relief Gill might obtain would be consistent with the comprehensive remedial scheme contemplated in the ADEA. Petition for Writ of Certiorari, App. at 12.

The ADEA does not bar injunctions. To the contrary, it allows a private lawsuit for "such legal or equitable relief as will effectuate the purposes of this chapter" *See* 29 U.S.C. § 626(c)(1). *Seminole Tribe* is therefore distinguishable (the Indian Gaming Regulatory Act, or "IGRA", discussed in *Seminole Tribe,* did not provide for declaratory and injunctive relief).

Petitioner erroneously compares Gill's claim to a "judicially-created" remedy, such as a *Bivens* action. Respondent has a federal statutory right to seek declaratory and injunctive relief against the Petitioner; he does not need to rely on any "implied" or judicially-created cause of action.

Petitioner erroneously compares *Ex parte Young* relief to claims against state officials in their individual capacities. Respondent recognizes that state officials – in their *individual* capacities – are not proper defendants under the ADEA for their conduct as supervisors of employees. *See, e.g. Smith v. Lomax*, 45 F.3d 402, 403-404 (11th Cir. 1995); *see also Haynes v. Williams*, 88 F.3d 898, 899-901 (10th Cir. 1996) (Title VII, is substantially identical to the ADEA, does not authorize individual capacity lawsuits against state officials for conduct as supervisors). Thus, if an *Ex parte Young* action were an individual capacity lawsuit against a supervisor, or fairly comparable to such a lawsuit, then an *Ex parte Young* action would be inconsistent with the ADEA. In fact, however, an *Ex parte Young* action is an official capacity lawsuit which does not impose any personal liability on state officials.

The *Ex parte Young* fiction requires suit against an individual state official, not the State or state agencies. As the state supreme court put it in this case: "The requirement that a plaintiff must sue a state official in an *Ex parte Young* claim remains an integral component of the *Ex parte Young* construct." Petition for Writ of Certiorari, App. at 23. Thus Petitioner could argue that suing the Board of a state agency, as Respondent did here, was improper under *Ex parte Young*. The New Mexico Supreme Court acknowledged that *Ex parte Young* required naming the individual Board members, not the Board as a unit, as Respondent had styled the case. The State's high court allowed, however, that Respondent may amend his lawsuit to name the individual members of the Public Employees Retirement Board, and that such an amendment would relate back to the filing of the original complaint. App. 22-23.

Petitioner errs, however, by concluding that an *Ex parte Young* claim is an "individual capacity" lawsuit. An action under *Ex parte Young* seeks relief against state officials in their *official* capacity. *Hutto v. Finney,* 437 U.S. 678, 690 (1978) ("In the landmark decision in *Ex parte Young*, 209 U.S. 123, the Court held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials in their official capacities.")

As the New Mexico Supreme Court recognized (App. 23) whether an *Ex parte Young* action constitutes an impermissible action against the State itself "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 278 (1997) (Kennedy, J.), *quoting In re State of New York,* 256 U.S. 490, 500 (1921).

In this case, an *Ex parte Young* action against the individual Board members in their official capacity would have the same effect as an ADEA lawsuit against the Board (except without damages or retrospective injunctive relief). The ADEA applies not only to state agencies but also to "*any agent*" of an employer. 29 U.S.C. § 630(b). The Public Employees Retirement Board is the trustee for the State's retirement fund. *See* N.M. Stat. Ann., § 10-11-130(b) (1997). The Board's members, in their official capacity as statutory trustees of the retirement fund, are agents for Respondent's former employer, the Hondo Volunteer Fire Department. The Board's members are state officials acting in their official capacity and within the scope of their agency as statutory trustees for the State's retirement fund. An injunction directed to them in their official capacity would have the same nature and effect as an injunction against the Petitioner as a state

agency, or as an employer's agent, under the ADEA. Thus, the New Mexico Supreme Court correctly ruled that relief under *Ex parte Young* would be consistent with the remedial scheme of the ADEA. The essential nature and effect of the proceeding is the same: to conform state retirement benefits with the requirements of the ADEA. The doctrine of *Ex parte Young* does not transform Respondent's ADEA claim into an impermissible individual capacity lawsuit against a state official.

CONCLUSION

Wherefore Respondent respectfully requests the Court deny the Petition for Writ of Certiorari so that Respondent may someday start receiving the monthly retirement benefit which he should have been receiving since 1997.

Respectfully submitted,

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